

SUPREME COURT OF THE UNITED STATES

October Term, 1954

1520

No. _____

FRED G. DRUMMOND,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

Petition for writs of certiorari to the
Circuit Court of Appeals of the Tenth
Circuit, and Brief in Support Thereof.

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INDEX

Subject	Page
PETITION FOR WRIT OF CERTIORARI	1
History of case	1
Sec. 6 Act April 18, 1912 (37 Stat. L. 86)	2
Sec. 7 Act April 18, 1912 (37 Stat. L. 86)	2
Pitts v. Drummond, 198 Ok. (574, 118 P 2d) 244	3
Pitts v. Drummond, 315 U. S. 814, 86 L. ed. 1212	3
Dates	4
Facts	5
Contention of the United States	5
Contention of Petitioner	5
Reasons for granting the petition for writ of certiorari	6
BRIEF in support of petition for writ of certiorari	10
I. The opinion of the Court below	10
II. Jurisdiction	10
Judicial Code, sec. 240a.	10
Rule 38 Supreme Court of United States	10
III. Statement of the Case	10
IV. Specifications of Error	10
V. ARGUMENT	11
1. The legality and justness of the indebtedness is admitted.....	11
2. Congress has specifically directed the payment of the indebted- ness owing from Pitts to petitioner	12
Sec. 4 Act Feb. 27, 1925 (43 Stat. L. 1008)	12
United States v. Sands, 94 F(2d) 156	12
3. The policy of Congress is to emancipate the Indians	13
Levindale Lead & Zinc Mining Co. v. Coleman, 241 U. S. 432, 36 S. Ct. 644, 60 L. Ed. 1080	14
Lynn v. Brown, 38 Okl. 209, 132 P. 810	15
Neilson v. Alburty, 26 Okl. 490, 129 P. 847	14
Sec. 7 Act June 28, 1906 (34 Stat. L. 539)	14
4. The decision of the Circuit Court of Appeals fails to follow precedent	15
Kenny v. Miles, 250 U. S. 58, 39 S. Ct. 417, 63 L. Ed. 841.....	16
Sec. 6 Act April 18, 1912, (37 Stat. L. 86)	15
United States v. LaMotte, 67 F(2d) 788	17
United States v. Mullendore, 30 Fed. Supp. 13	18
5. The decision is in conflict with Departmental interpretation.....	21

(INDEX—CONTINUED)

Subject

Page

Opinion Preston C. West, Assistant Attorney General.....21

6. The title and right to possession of the land went to George Pitts, the sole heir, upon the death of his wife and there never was thereafter any turning over to him23

21 Am. Jur. 54125
 Davis v. Morgan, 186 Okl. 30, 95 P(2d) 85625
 Globe Indemnity Co. v. Bruce, 81 F(2d) 14325
 Osage Act July 8, 1940 (45 Stat. 745)27
 Opinion Comptroller General of United States29
 Pitts v. Drummond, 198 Okl. 574, 118 P(2d) 24423
 Rayburn v. Carney, 170 Okl. 255, 39 P(2d) 924
 Swain v. Hildebrand, 169 Okl. 327, 36 P(2d) 94224
 Simon v. Shaffer, 11 F. Supp. 45026
 Sec. 4 Act March 2, 1929 (45 Stat. L. 1478)26
 Sec. 2 Act Feb. 27, 1925 (43 Stat. L. 1008)27
 Thompson's Estate, 179 Okl. 240, 65 P(2d) 44224
 Title 58 O. S. A. 29127
 Varner v. Clark, 283 F. 1727

7. The purpose of section 7 of the Act of April 18, 1912.....29

8. Points of the Circuit Court of Appeals opinion34

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.....38
 Gentry's estate, 158 Okl. 196, 13 P(2d) 15637
 Jackson v. Harris, 43 F(2d) 51338
 Pitts v. Drummond, 198 Okl. 574, 118 P(2d) 24438
 United States v. State of Texas, 314 U. S. 480, 86 L. Ed. 356.....38
 Whitehouse Lumber Co. v. Howard, 142 Okl. 163, 286 P. 327.....38

9. The United States consented to be bound by the State Court action40

27 Am. Jur. 57244
 Chicago R. I. & P. Ry. v. Schendel, 270 U. S. 611
 70 L. Ed. 75744
 Fulson v. Quaker Oil & Gas Co., 35 F(2d) 84.....44
 Heckman v. United States, 224 U. S. 413, 32 S. Ct. 424,
 56 L. Ed. 82043-44
 Lane v. Santa Rosa, 249 U. S. 110, 39 S. Ct. 185, 63 L. Ed. 604.....42
 Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 12943
 Logan v. United States, 58 F(2d) 24743
 Marrs, et al v. McDougal, et al, 40 F(2d) 24744
 Souffront v. LaCompagnie Des Sucreries, 217 U. S. 475,
 30 S. Ct. 608, 54 L. Ed. 84643
 United States v. Candelaria, 16 F(2d) 55942
 United States v. Candelaria, 279 U. S. 432, 70 L. Ed. 1032.....~~1023~~ 42
 United States ex rel Kennedy v. Tyler, 269 U. S. 13,
 70 L. Ed. 13844
 United States v. Waller, 243 U. S. 452, 61 L. Ed. 843.....45
 Vinson v. Graham, 44 F(2d) 77244

SUMMARY45

(Italics in this brief are ours for emphasis)

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. _____

FRED G. DRUMMOND,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO CIRCUIT
COURT OF APPEALS OF THE TENTH CIRCUIT.**

To the Honorable Harlan F. Stone, Chief Justice,
and to the Associate Justices of the Supreme Court
of the United States.

Your petitioner, Fred G. Drummond, most respectfully
represents and shows to you as follows:

HISTORY OF THE CASE.

Petitioner, Fred G. Drummond, instituted an action in
the district court of Osage county, Oklahoma, on October 24,
1939, against George Pitts for money judgment on a note
and to foreclose a mortgage executed by Pitts on July 12,
1937, on land which he had inherited from his deceased wife,
Mamie Pitts, who was a full-blooded Osage Indian who had

never been granted a certificate of competency.

George Pitts defended that action, claiming the land was restricted against voluntary alienation without the approval of the Secretary of the Interior, alleging that he was a full-blood Osage Indian and that the certificate of competency, which had been granted to him on July 11, 1910, by the Secretary of the Interior, was revoked on June 24, 1938, over eleven months after the mortgage had been given to Drummond.

Pitts alleged and contended that the mortgage to Drummond was invalid by reason of section 7 of the Osage Act of April 18, 1912 (37 Stat. L. 86) and for another reason which is not involved here.

Section 6 of the same act provides for the partitioning of inherited lands and further as follows:

"Sec. 6. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator".

Section 7 of the act is as follows:

"Sec. 7. That the lands allotted to members of the Osage Tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or

obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage Tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. *That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs; Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage county, state of Oklahoma; Provided further, That nothing herein shall be construed so as to exempt any such property from liability for taxes".*

The district court of Osage county, Oklahoma, held against George Pitt's contention and he appealed to the Supreme Court of Oklahoma where the trial court was affirmed (*Pitts v. Drummond*, 198 Okl. 574, 118 P(2d) 244.)

Then Pitts made application to the Supreme Court of the United States for writ of certiorari to the Supreme Court of Oklahoma, which application was denied on March 2, 1942, *Pitts v. Drummond*, 315 U. S. 814, 62 S. Ct. 799, 86 L. Ed. 1212.

On April 29, 1942, the United States brought this action in the United States District Court for the Northern District of Oklahoma, in its own behalf and in behalf of George Pitts, to cancel the mortgage from Pitts to Drummond, alleging the same reasons and making the same contentions concerning the invalidity of the mortgage as had been made by Pitts in the

state court and in his petition to this court for writ of certiorari (Rec. p. 1).

The united States District Court made findings of fact and conclusions of law (Rec. p. 54) and rendered judgment in favor of the defendant Drummond (Rec. p. 59).

The United States appealed to the Circuit Court of Appeals Tenth Circuit where an opinion was rendered on August 1st, 1944, reversing the trial court and holding the mortgage invalid (Rec. p. 85).

The holding is that under the provisions of the second sentence of section 7 of the Act of 1912 the mortgage was invalid because it was executed before the heirs of Mamie Pitts were determined.

DATES.

George Pitts, an Osage Indian, was granted a certificate of competency July 11, 1910.

His wife, Mamie Pitts, a full-blood Osage Indian, who was never granted a certificate of competency, died May 24, 1937.

On July 12, 1937, George Pitts gave the mortgage on the lands inherited by him from his deceased wife, Mamie.

The certificate of competency held by George Pitts was revoked by the Secretary of the Interior on June 24, 1938,

nearly a year after the mortgage had been given.

The heirs of Mamie Pitts were determined by the County Court of Osage county, Oklahoma, September 9, 1938 (Rec. 44, 3).

Drummond instituted his action to foreclose the mortgage in the district court of Osage county, Oklahoma, on the 24th day of October, 1939 (Rec. 44, 45, 6, 14).

FACTS.

There has been no dispute as to the facts.

CONTENTION OF THE UNITED STATES.

It has not been contended that the debt was unjust or invalid, but merely that the mortgage was invalid because it was executed before the heirs of Mamie Pitts were determined.

CONTENTION OF PETITIONER.

Your ²petitioner contends:

1. That section 6 of the Act of April 18, 1912, (37 Stat. L. 86) removed all restrictions against alienation of inherited lands in the hands of an heir with a certificate of competency.
2. That the second sentence of section 7 of the Act was intended merely to protect the estate of a decedent from a creditor of an heir during the time that the administrator

was entitled to possession, and was not intended to forever prohibit such creditor from securing satisfaction from the inherited property merely because the debt was created before the heirs were determined.

3. That the administrator never had and was not entitled to have possession of the land of Mamie Pitts for the reason that it was her restricted land and was not an asset of her estate which was subject to administration, or which could be taken to satisfy her debts, but descended to and vested immediately upon her death in her heirs, and consequently there was no turning over to be done, or which could be done, by the administrator.

4. That the United States consented to be bound by the state court action in that Ralph A. Barney, counsel for Pitts, was employed by the approval of the Secretary of the Interior and the Secretary of the Interior aided in the state court litigation by assisting Pitts' counsel, approving supersedeas bond, advancing the necessary costs and expenses from Pitts' funds, by approving the appeal to the Supreme Court of Oklahoma and the making of the application to the Supreme Court of the United States for the writ of certiorari to the Supreme Court of Oklahoma.

Reasons for granting the petition
for writ of certiorari.

A.

The case involves the construction of an Act of Congress

ating to the Osage Indians, and the opinion of the Circuit Court of Appeals adversely affects the title to lands in Osage County, Oklahoma, which had been considered secure for many years.

B.

The decision is in direct conflict with the decision of the Supreme Court of Oklahoma in the case of *Pitts v. Drummond*, 198 Okl. 574, 118 P(2d) 244, and is in direct conflict with the implication to be drawn from the decision of this court in denying the application of *Pitts* for writ of *habeas corpus* to the Supreme Court of Oklahoma, 315 U. S. 814, 42 S. Ct. 799, 86 L. Ed. 1212. Evidently this court found error or injustice in the Oklahoma Supreme Court decision.

C.

The decision is in conflict with applicable decisions of the Supreme Court of the United States. *Kenny v. Miles*, 258 U. S. 58, 63 L. Ed. 481.

D.

The decision is in conflict with other Circuit Court of Appeals decisions, *United States v. LaMotte*, 67 Fed (2d) 788.

E.

The decision is in conflict with the United States District Court opinion in the case of *United States v. Mullendore*, 30 Supp. 13, which decision became final.

F.

The decision is in conflict with Interior Department interpretation of thirty years standing. Opinion of the Honorable Preston C. West, Assistant Attorney General, to the Secretary of the Interior of March 23, 1914.

G.

The decision is in conflict with the policy of Congress to permit Indians with certificates of competency to conduct their affairs as any other citizen.

H.

The decision is in conflict with the clear and expressed intention of Congress and is in conflict with logical reasoning.

I.

The decision is in conflict with the Oklahoma Supreme Court's interpretation of the Oklahoma laws.

J.

The decision is in conflict with the case of United States v. Candelaria, 270 U. S. 432, 70 L. Ed. 1030, and the Circuit Court of Appeals opinion in the same case, 16 F. (2d) 559.

K.

There is attached hereto a transcript of the record, certified to by the clerk of the Circuit Court of Appeals of the tenth circuit on September 15, 1944.

Wherefore your petitioner prays that a writ of certiorari issue under seal of this Court to the Circuit Court of Appeals

of the Tenth Circuit commanding said court to certify to this Court a full and complete transcript of the record of the proceedings in said Circuit Court of Appeals had in the case numbered and entitled on the docket, No. 2895 United States of America, appellant, versus, Fred G. Drummond, appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that judgment rendered in said Tenth Circuit Court of Appeals be reversed by this Court and for such further relief as this Court may deem proper.

Dated at Pawhuska, Oklahoma, this 25th day of September, 1944.

Chas. R. Gray,

W. N. Palmer,

Pawhuska, Oklahoma.

Roy St. Lewis,

Natl. Press Bldg.,

Washington, D. C.

Counsellors for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals of the Tenth Circuit is printed in full in the record pages 85 to 90. The decision was rendered August 1, 1944, and petition for rehearing was denied August 28, 1944.

II.

JURISDICTION.

The jurisdiction of the Court is covered by the Judicial Code, section 240a, as amended by the Act of February 13, 1925, and as provided by Rule 38 of this Court adopted February 13, 1939. The date of the judgment to be reviewed is August 1, 1944.

III.

STATEMENT OF THE CASE.

A statement has been made in the petition and will not be repeated here.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals of the Tenth Circuit erred in the following particulars:

1. In reversing the judgment of the United States Dis-

trict Court for the Northern District of Oklahoma.

2. In holding that section 7 of the Act of Congress of April 18, 1912, restricted the inherited lands against voluntary alienation by an heir who held a certificate of competency.

3. In failing to hold that in the situation section 6 of the Act of April 18, 1912, was controlling.

4. In failing to follow precedent.

5. In refusing to follow the interpretation of the Oklahoma Supreme Court of the Oklahoma law.

6. In refusing to adopt the interpretation of the Interior Department.

7. By erroneous reasoning.

8. In holding the mortgage to Drummond invalid.

9. By refusing to hold that the United States had consented to be bound by reason of its assistance in the state court action and in refusing to hold that the United States was therefore estopped from maintaining this action.

V.

ARGUMENT.

1. The legality and justness of the indebtedness is admitted.

Neither the legality nor the justness of the indebtedness owing from George Pitts to the petitioner has ever been questioned either by George Pitts or by the United States

throughout the entire course of the litigation.

2. Congress has specifically directed the payment of the indebtedness owing from Pitts to petitioner.

Section 4 of the Osage Act of February 27, 1925, 43 Stat. L. 1008 (25 U. S. C. A. sec. 331, note) provides:

"Sec. 4. Whenever the Secretary of the Interior shall find that any member of the Osage Tribe of more than one-half Indian blood, to whom has been granted a certificate of competency, is squandering or misusing his or her funds, he may revoke such certificate of competency after notice and hearing in accordance with such rules and regulations as he may prescribe and thereafter the income of such member shall be subject to supervision and investment as herein provided for members not having certificates of competency to the same extent as if a certificate of competency had never been granted; Provided, *That all just indebtedness of such member existing at the time his certificate of competency is revoked shall be paid by the Secretary of the Interior, or his authorized representative, out of the income of such member, in addition to the quarterly income hereinbefore provided for; And provided further, That such revocation or cancellation of any certificate of competency shall not affect the legality of any transactions theretofore made by reason of any certificate of competency*".

The meaning of this section is clearly stated by the opinion of the Tenth Circuit Court of Appeals in the case of *United States v. Sands*, 94 F.(2d) 156, which involved a mortgage on land, but not inherited land. We quote from the syllabus of that case:

- "8. The revocation of a certificate of competency

of an Osage Indian, who was vested with title to land subject to a valid mortgage lien securing notes, did not affect the rights of the owner and holder of the notes and mortgage. Act Feb. 27, 1925, sec. 4, U. S. C. A. sec. 331 note.

"13. Where an Osage Indian, at the time notes and a mortgage were executed, held a certificate of competency, the owners and holders of the notes and mortgage had a right to rely on the statute requiring the payment by the Secretary of the Interior of all just indebtedness existing at the time of the revocation of such certificates and providing that such revocation or cancellation shall not affect the legality of any transactions theretofore made by reason of the issuance of a certificate of competency. Act Feb. 27, 1925, sec. 4, 25 U. S. C. A. sec. 331 note.

"15. The United States is not entitled to have a sale of land under a decree foreclosing a mortgage executed by an Osage Indian prior to revocation of his certificate of competency set aside, to have title quieted in his heirs, and to have an injunction against those claiming under the mortgage, until the indebtedness has been paid".

A compliance with this statute and law would have avoided this litigation entirely, and it should be remembered that the validity and justness of the indebtedness is not questioned.

3. The policy of Congress is to emancipate the Indians.

In furtherance of that policy Congress provided for the granting to the Indian of a certificate of competency to enable him to manage, control, and dispose of his lands the same as any citizen of the United States.

The original Osage Act which authorizes the issuance of

certificates of competency to the Osages provided as follows, (Sec. 7, Act June 28, 1906, 34 Stat. L. 539):

"Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years or during the life of the homestead allottee, if upon investigation, consideration and examination of the request he shall find any such member *fully competent and capable of transacting his or her own business and caring for his or her own individual affairs*; Provided, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, *shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States . . .*"

Mr. Justice Hughes says in *Levindale Lead & Zinc Mining Company v. Coleman*, 241 U. S. 432, 36 S. Ct. 644, 60 L. Ed. 1080:

"It was provided that upon the issuance of such a certificate of competency the lands of such 'member' except homestead lands, should 'become subject to taxation,' and that 'such member,' except as provided, should have the right to 'manage, control and dispose of his or her lands the same as any citizen of the United States.'"

In *Neilson v. Alburty*, 26 Okl. 490, 129 P. 847, the Oklahoma Supreme Court, in speaking of the authority of an Osage Indian, with a certificate of competency, said:

(From the opinion p. 849). " 'And such member * * * shall have the right to dispose of,' sufficiently comprehensive to warrant the construction contended for. 'To dispose of' means to exercise finally one's power of control over; to pass over into the control of some one else, as by selling; to alienate, to part with, to relinquish, to get rid of."

In *Lynn v. Brown*, 38 Okl. 209, 132 P. 810, it is said:

(From opinion p. 812). "The certificate of competency provided for by the special act relating to this tribe of Indians and their lands authorized the member to whom it was issued to sell and convey any lands deeded him by reason of that act, except his homestead, which authority was granted only after a finding that the member was fully competent and capable of transacting his or her own business, and caring for his or her own individual affairs. The land was thereafter made subject to taxation, and the member was vested with the full right to manage, control, and dispose of it the same as any citizen of the United States".

There are many similar expressions in the cases.

4. The decision of the Circuit Court of Appeals fails to follow precedent.

The whole of section 6 of the Act of April 18, 1912, is as follows:

"Sec. 6. That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the state of Oklahoma; Provided, That no partition or sale of the restricted lands

of a deceased Osage Allottee shall be valid until approved by the Secretary of the Interior. Where some heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said lands shall be valid when approved by the court and the Secretary of the Interior. *When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed.* If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them *without the intervention of an administrator.* The shares, due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees".

Section 7 is copied in full in petition (page 2 herein).

The Supreme Court of the United States has interpreted the above quoted and emphasized provision in section 6 in exact accordance with the plain purpose of the language used, in the case of *Kenny v. Miles*, 250 U. S. 58, 63 L. Ed. 841 39 S. Ct. 417. We quote from the case:

"2. syl. Lands allotted in the name of an Osage

Indian under Act June 28, 1906, whether allotted before or after her death, held, in view of sections 1, 2, 6, 7 and 8 thereof, restricted lands, so that, under Act April 18, 1912, sec. 6, they cannot be sold or partitioned after her death without approval of the Secretary of the Interior, neither she *nor her heirs*, who are of Osage blood and members of the tribe, *having received a certificate of competency*.

(From opinion p. 418.) "The Act of 1912, in its sixth section, treats the restraints applicable to living allottees as also applicable to such of the heirs of deceased allottees as are members of the tribe, and expressly provides that—

'When the heirs of such deceased allottees have certificates of competency the restrictions on alienation are hereby removed'.

"Lah-tah-sah died without receiving a certificate of competency. Kenny and Miles, who claim to be her heirs, are of Osage blood and members of the tribe, *and neither has received such a certificate*".

And from the case of United States v. LaMotte, 67 Fed. (2d) 788, from the opinion p. 789:

"The pertinent part of section 6 of the act approved April 18, 1912 (37 Stat. 86), provides:

"When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed".

"(3). The statute is clear and unambiguous, and it was in force at all times material hereto. It removed the restrictions on alienation upon heirs of a deceased allottee having certificates of competency and upon those not members of the tribe."

We think it must be conceded that in view of the admitted facts there was no restriction against alienation of

the land here involved in the hands of George Pitts.

This has been settled law for nearly thirty years.

Sections 6 and 7 of the Act were construed together, when this same question was presented, by the United States District Court in the case of *United States v. Mullendore*, 30 Fed. Supp. 13, from which we quote:

"Two questions are presented: First, is section 7 controlling; second, if controlling, is it to be construed to prohibit alienation of inherited land until both lands and moneys are turned over to the heir.

"As to the first question:

"(1). Section 6 of the Act of April 18, 1912, 37 Stat. L. 86, 87, provides, in part: 'When the heirs of such deceased allottees . . . are not members of the tribe, the restrictions on alienation are hereby removed.' Frank DeRoin was not a member of the tribe. Under the provisions of section 6, 'restrictions on alienation' by him are removed. 'Restriction' as used in such acts is synonymous with 'prohibition'. *Barnett v. Kunkel*, 8 Cir. 259 F. 394, 398. Obviously, the quoted portion of section 7 contains a prohibition against alienation and so imposes a restriction, and if section 7 controls it conflicts with section 6 in so far as non-members of the tribe are concerned.

"(2). It is the duty of the court to construe a statute so as to give effect to each and every part thereof and so as to avoid conflict between various provisions of the statute, 59 C. J. 948.

'If the language of section 6 is taken to mean what it says, restrictions on alienation of Frank DeRoin's interest in this land are removed by it. This language is clear and definite. The language of section 7 is not clear, because of the word 'such' preceding 'heir,' but by holding that section 7 applies to heirs not included in the

classification set forth in section 6, all conflict is avoided and each section of the statute has a field for operation without encroaching upon the field in which the other section operates.

"(3). Reading the Act of April 18, 1912, as a whole, there is apparent in it a purpose to protect Osage allottees and their Osage Indian heirs through the imposition of restrictions upon the alienation of their allotted lands and trust moneys, but there seems to be no policy for the protection of non-members of the tribe, the implication being to the contrary. Compare *Levindale Lead and Zinc Co. v. Coleman*, 241 U. S. 432, 36 S. C. 644, 60 L. Ed. 1080; Sec. 5, Act of March 2, 1929, 45 Stat. L. 1478, 1481, 25 U. S. C. A. sec. 331, note.

"(4). *I therefore conclude that the question of the alienation of Frank DeRoin's interest in the lands of Mary Black DeRoin is controlled by the provisions of section 6 rather than by the provisions of section 7 and that the lease and mortgage were and are valid.*"

"As to the second question:

" 5, 6) Even were Section 7 applicable here, it is still my opinion that section does not invalidate the lease and mortgage. The language of the statute is 'that no lands or moneys inherited . . . shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heir,' but the Courts have many times held that 'and' in a statute may be read to mean 'or'. *Exparte Clark* 4, 30 Okl. Cr. 259, 236 P. 60; *State v. Hooker*, 22 Okl. 712, 98 P. 964; *State v. Co* 70 Mont. 355, 225 P. 1007; *Alexander v. State*, 84 Tex. Cr. 75, 204 S. W. 644. There seems to be no logical reason for maintaining restrictions on the land until such time as the money may be turned over to the heir. A contrary holding would make the title to lands dependent upon matters which could not be ascertained from land records and would tend to make such lands unmarketable.

"(7). There is some contention that the land had not been 'turned over' to DeRoin at the time he executed the instruments in question but I cannot subscribe to that construction of the language quoted. The phrase is not a technical one and it is my view that the requirement of the statute is satisfied when the heir is placed in possession of the property. Technical consideration of whether or not DeRoin acquired his title upon the death of the ancestor or upon the date of the decree of distribution or at some intermediate time seems to be beside the point here, although it may be noted that the statutes of Oklahoma provide the administrator of the estate takes possession only for the purpose of administration and as soon as it appears that the lands are not necessary for the payment of debts, the lands shall be delivered to the heirs. Sec. 1193, 1218, Okl. Stat. 1931, 58 Okl. St. Ann. sec. 251, 291".

Please note that the opinion first holds that the situation is controlled by section 6, and then holds that section 7 cannot apply.

Frank DeRoin was an Indian but not of the Osage Tribe. Note that section 6 places the non-member of the tribe and the member with a certificate of competency in the same class. As to both the restrictions "are hereby removed".

If section 7 applies, it should be construed as applying to only those persons who are not exempted from its application by section 6.

The reasoning in the opinion in the Mullendore case is sound. Obviously, if there is a conflict in the two sections, they must be construed together and as Congress has so unequivocally by section 6 removed all restrictions against

alienation by the Indian with a certificate of competency and by the non-member of the tribe, it is definitely certain that Congress was not intending to reimpose those restrictions by the next section on the certificate of competency Indian and on the non-member of the tribe. That conclusion is rendered undubitably certain by the fact that the non-member of the tribe was frequently a white person without any Indian blood, and, if respondent's interpretation is to be followed, Congress by section 7 imposed restrictions upon those white heirs.

Therefore section 7 must be construed as not restricting those persons liberated by section 6, namely, the non-member and the certificate of competency member, or it must be construed as intended only to prohibit interference with the possession of the administrator for the time only in which he was entitled to possession. Either construction makes the decision of the Circuit Court of Appeals erroneous.

5. The decision is in conflict with Departmental interpretation.

The following quotation is from the opinion of the Honorable Preston C. West, Assistant Attorney General, concerning the 1912 Act, rendered to the Honorable Secretary of the Interior on March 23, 1914:

"The intent of Congress as gathered from these two acts (1906 and 1912) was to place members of this tribe in complete control of their property, relieved of supervision of the Government, as rapidly as might be done with due regard to the interests of the individuals. The effect of a certificate of competency as stated in the act of 1906 was to confer upon the member 'the right to manage, control, and dispose of his or her lands the same

as any citizen of the United States'. Apparently there was no doubt whether this declaration related to lands inherited from an Osage allottee who had not received a certificate of competency even though the heir held such certificate. The District Court, in deciding the case of *United States v. Aaron*, September 6, 1910, (183 Fed. 347) had said that the restrictions ran with the land and was effective against alienation after it descended to the heirs. No exception was noted as to those of the heirs who had received certificates of competency and thus been given full control of their own allotments. It seems fair to presume that this provision was inserted in the law of 1912 in view of said ruling, and in any event it is apparent that the purpose was to afford competent Osages and non-members relief from conditions which they naturally regarded as burdensome and *to give them the same control over inherited lands that competent Osages have over their original allotments.* * * *

"If the allottee had not received a certificate of competency, his lands were restricted at the time of his death, but, by virtue of the act of 1912, became unrestricted in the hands of his heirs having certificates of competency or being non-members of the tribe. Such heirs may sell their respective shares before partition. No order of the court is necessary unless the party be insane or otherwise incompetent of acting sui juris under the laws of the state.

"The second question is, can a sale be made 'before partition by all the heirs, if all the heirs are competent; and, if so, must it be by order of the court.

"The first clause must be answered in the affirmative and the second in the negative, assuming always that the parties are not disqualified under the laws of the state.

"Third, does the death of an allottee remove the restrictions on surplus lands and homestead, or an undivided interest therein of a competent heir?

"Death does not remove restrictions except in those cases where the allottee had received a certificate of competency. The act of 1912 removes all restrictions upon inherited lands in the hands of an heir who has received a certificate of competency or is not a member of the tribe".

May it be said that the Osages with certificates of competency have dealt freely with their inherited lands for 30 years, and since the West opinion. No question has been raised as to their right to do so until comparatively recently.

6. The title and right to possession of the land went to George Pitts, the sole heir, upon the death of his wife and there never was thereafter any turning over to him.

The courts have uniformly and consistently held that the restricted lands of a restricted deceased Indian is not an asset of his estate which is subject to administration. The court may determine the heirs but cannot take possession of the real estate.

The only purpose for which the administrator is ever entitled to possession of real estate is to use it to pay the debts of the decedent and as the restricted real estate is not liable for such debts the administrator cannot have possession of it.

See the opinion of the Supreme Court of Oklahoma in Pitts v. Drummond, 198 Okl. 574, 118 P. (2d) and cases therein cited.

The following language is from *Swain v. Hildebrand*, 169 Okl. 327, 36 P(2d) 942, an Osage case:

"Thus it has been held that the restricted lands of an Indian are not subject to administration. *Cowokochee v. Chapman*, 90 Okla. 121, 215, P. 759; *Barnard v. Bilby*, 68 Okl. 63, 171 P. 444. And that prior to specific enactment of Congress, the state courts had no authority to determine heirs, in so far as it would affect restricted property during the trust period. *Gray v. McKnight*, 75 Okl. 268, 183 P. 489; *Caesar v. Krow*, 71 Okl. 233, 176 P. 927. And the income accruing to an Osage headright cannot be sold and transferred by an Osage Indian by blood, because there is no specific congressional authority therefor. *DeNoya v. Arrington*, 163 Okl. 44, 20 P(2d) 563; *Taylor v. Tayrien*, 51 F (2d) 884 C. C. A.; *In re Dennison* (D. C.) 38 F(2d) 662. And that such headright does not pass to the trustee in bankruptcy. *Taylor v. Tayrien*, supra; *In re Dennison*, supra; *Taylor v. Irwin* (C. C. A.) 60 F(2d) 495.

"In *Williams v. Hewitt*, 74 Okl. 283, 181 P. 286, this court held that there was nothing in the Osage allotment act of 1906 conferring probate jurisdiction on the county courts of this state, and that the subsequent act of 1912 (37 Stat. 86) only operated to confer authority and jurisdiction on such courts to the extent therein expressly provided, thus recognizing the exclusive control of these Indian matters to be in the federal government".

See, also, *Rayburn v. Carney*, 170 Okl. 255, 39 P(2d) 9.

In the case of *In re Thompson's Estate*, 179 Okl. 240, 65 P(2d) 442, it was held that the county court had jurisdiction to determine the heirs to restricted property notwithstanding the fact that it was not an asset of the estate for the payment of debts.

In the case of *Globe Indemnity Co., v. Bruce*, 81 F(2d) 143, the court approved the holding in the case of *DeNoya v. Arrington*, 163 Okl. 44, 20 P (2d) 563, to the effect that the Osage headright (the community interest in the oil and gas) was not an asset of the estate, except as to the accruing payments which were turned over by the Osage Agency to the administrator.

There could be even less question about restricted real estate of a restricted Osage Indian for there is no provision of any act of Congress which would under any circumstance permit its use for the payment of debts or expenses of administration. The Osage acts do provide for the payment of certain debts from the income from the headright, but the Acts of Congress prohibit the encumbrance or sale by any one or for any purpose of the restricted lands of a restricted Osage Indian.

The opinion of the Circuit Court of Appeals appears to agree to the universally and well-recognized principle of law that the title to real estate passes at once to the heir upon the death of the intestate. 21 Am. Jur. 541, *Davis v. Morgan*, 186 Okl. 30, 95 P(2d) 856.

Then as George Pitts had the title and possession upon the death of his wife, it cannot reasonably be said that the land had not been turned over to him. He not only had title and possession but he was the owner. He became the owner by reason of the law of succession and the later adjudication that he was the sole heir and owner did not change his title,

his right to possession or his ownership but merely confirmed them, thus constituting an adjudication of facts already in existence, but that adjudication did not change those facts.

The act in question uses the words "turned over" which certainly do not require more than title, possession, and ownership, even though those things had not been established by court decree. The county court cannot turn over the land because the court did not have it. The full extent of the authority of the court as far as this land was concerned was to determine the heirs, and thereby confirm the theretofore existing facts.

In *Simon v. Shaffer*, 11 Fed. Supp. 450, the United States District Court said:

"(2) Where there is no administration proceeding *pending or the property involved is not subject to administration*, or all debts have been paid and plaintiff is the sole heir, or the probate court has decreed distribution, heirs have the right to sue without joining the administrator".

Congress has recognized that the administrator was not entitled to the possession of the real estate of a deceased restricted Osage Indian:

By Section 4 of the Osage Act of March 2, 1929 (45 Stat. L. 1478) Congress authorized the administrator of an estate to be paid certain limited funds for certain specific purposes from the income from the headright interest (the community interest in the minerals underlying the Osage Nation, the minerals having been reserved to the Tribe).

Section 2 of the Osage Act of February 27, 1925, (43 Stat. L. 1008) contains a similar provision.

In 1940 Congress gave recognition to the fact that the title, ownership and right to possession of the restricted real estate of a deceased Osage was in the heir, and that the administrator had no right to the possession of it, by providing that the Superintendent of the Osage Agency might lease it until the heirs had been determined, and thereafter, if the heirs were not using it themselves and were unable to agree upon a lease on it. Act July 8, 1940, 54 Stat. 745.

Even in a case where the estate of a white man is involved the administrator is not entitled to possession of the real estate when it is not needed for the payment of debts. Section 291 of Title 58 Okl. Stat. Ann.:

“291. Term of possession of realty.

“Unless it satisfactorily appears to the probate court that the rents, issues and profits of the real estate for a longer period are necessary to be received by the executor or administrator wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, at the end of ten months from the first publication of the notice to creditors, the court must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees”.

The heirs in Oklahoma are not determined for at least one year on account of certain statutory provisions. In *Varner v. Clark*, 283 F. 17 (C. C. A. 8th, 1922), now the Tenth Circuit, this was said:

"The purposes of the administration of the estates of deceased persons are to secure payment of debts due to or from the estate, and thereafter to distribute any residue to the persons entitled thereto. Where there are no such debts and no question as to the persons entitled to the estate, there exists no logical reason for imposing the burdens, delays and expense of administration upon the estate, or upon the probating tribunals, unless a statute clearly requires such action. We have been cited to no such requirements in the statutes of Oklahoma or of Oregon".

Supposing there had never been a decree determining the heirs, and such a situation is conceivable for many relatives of deceased persons delay or neglect altogether the filing of probate proceedings. Oklahoma has a statute authorizing the quieting of title to inherited property. Title 84 O. S. A. 257.

Suppose this were an instance in which no probate proceeding had been filed and George Pitts had brought a quiet title proceeding as authorized by statute and at the conclusion thereof the court had quieted title in him, would there be any difference in his title, ownership, or possession after than before such a decree? Does not the decree merely confirm them? It finds that he is the owner, has title, and the right to possession. The court merely decreed that he already had previously acquired them under the law of succession and he acquired the right to immediate possession under the same law and under the federal and state law which gave him the right to immediate possession.

It is even conceivable that there might never be a determination of heirs or a quiet title suit as far as the land is

concerned. We have known of a few instances, where the heirs were well known, of title having been passed by competent title examiners where there had never been a determination of heirs or a quiet title suit.

Section 6 of the 1912 Act involved here provides for the payment to competent heirs of the proceeds from partition actions "without the intervention of an administrator".

The Honorable J. R. McCarl, Comptroller General of the United States, in an opinion to the Honorable Secretary of the Interior, dated November 2, 1926, A-15,957, in construing section 6 of this 1912 Act held that under the circumstances provided by section 6 the funds inherited or bequeathed to competent heirs must be paid to them direct without the intervention of an administrator.

7. The purpose of section 7 of the
Act of April 18, 1912.

The first sentence of section 7 definitely states that the property of an Indian with a certificate of competency may be taken to satisfy any debt created after the date of the issuance of the certificate of competency, which in the George Pitts case was in 1910.

His wife, Mamie, died in 1937. Certainly Congress was not by the same section endeavoring to reimpose restrictions on George Pitts after so definitely having removed them by section 6, and so definitely providing by the first sentence in section 7 that the certificate of competency should become fully operative on the date of its issuance.

The reason for the enactment of the second sentence of the section seems apparent. At the time of the passage of the 1912 Act any adult Osage, whether he had a certificate of competency or not, could contract valid indebtedness, and such indebtedness could be satisfied from the unrestricted property of the Indian, and by the 1912 act it was expected that the income of a deceased Indian would be paid to the administrator, which was actually done in practice after its passage.

It is the general law that an heir may create a debt and a lien against his share of an estate, particularly real estate, but it is also general law that the creditor of the heir, or the alienee of the heir, cannot interfere with the possession of the administrator as long as the administrator has the right to use the inherited property to pay debts of the decedent. The second sentence of section 7 is merely declaratory of that general law.

It may not have been essential for Congress to so provide, but it was at least a natural and expected provision, for statutes are very often declarations of existing common law principles.

Suppose the deceased was an Osage, who had been granted a certificate of competency, then his land was an asset of his estate which would be liable for his indebtedness and the administrator was entitled to possession of it for the purpose of paying his debts. Such land could not be taken by a creditor of an heir until the administrator of the estate of the decedent had surrendered possession of it.

A reasonable construction of the second sentence of section 7, and one in accord with the plain purpose of Congress and also in accord with the universal law in such matters, would be to prohibit the taking of such lands and moneys prior to the time they are turned over to the heir to secure the payment of any indebtedness incurred by such heir.

In other words, what the sentence does is to postpone the time the creditor of an heir can reach the intestate property to secure satisfaction of his obligation until after the administrator is through with the property. Still in other words, Congress does not declare the debt forever invalid, or does not declare that it can never be collected from the inherited property, simply because it was incurred by the heir before the administrator was through with the inherited property. The words, 'incurred by the heir', are merely descriptive of the indebtedness and the words, 'prior to the time,' of turning over referred to the time that the lands and money may not be taken or sold to satisfy an obligation of the heir. The statement being made is:— That the lands and moneys may not be sold or taken prior to the time they are turned over to the heirs. That is a complete sentence. In it is the clause describing the indebtedness of the heir, for which the property may not be taken until after the "turning over."

The sentence includes money as well as land. Money is often "turned over"—paid to the heirs before a determination of heirs has been had; very frequently a family allowance to the widow or the family, and less frequently partial distributions. Certainly Congress did not intend to say that the

groceryman could never collect his account from such funds merely because he extended the credit before the heirs were determined.

Let it be assumed that there is presented a situation such as this:— George Pitts, an Indian, who has had a certificate of competency for over 25 years, contracted a debt in 1935, and that he inherited land from his wife or some other relative in 1936 and that it was so decreed by the court in 1937, and that there was no question about the inherited land being unrestricted in George Pitts' hands, except for this section 7, then did Congress mean to say that the debt could never be collected from George Pitts' inherited property, or, did Congress intend to say that the creditor could not collect from the inherited property prior to the time it was turned over to George Pitts, or while the administrator was entitled to possession of it?

Obviously Congress intended to legislate concerning the collection of a debt by a creditor of the heir before or prior to the time that the property was turned over to the heir. The heir of an Osage might be a white man. In fact he often is, and Congress merely meant to say that no creditor of any heir could interfere with the administration of the estate of a decedent, and Congress never intended to prohibit for all time the collection of a debt that may otherwise be valid from the inherited unrestricted property merely because it was incurred before the heir received the property.

It is not the contracting of the debt or the voluntary encumbering of the property which is prohibited, but the

forcible taking of it to satisfy the debt, which cannot be done until after the turning over. Drummond's action was not begun until October 24, 1939, and the decree of heirship was entered September 9, 1938.

It is interesting to contemplate that this 1912 act was in force for 25 years, and that during that 25 years the Indians with certificates of competency dealt freely with their inherited property, before any one ever thought to suggest that section 7 reimposed restrictions against alienation upon that inherited property.

If this second sentence of section 7 means what the opinion of the Circuit Court of Appeals appears to hold, then restrictions have been imposed not only upon the Indian heir, who has a certificate of competency, but upon the white heir as well, and there have been many white spouses who were heirs. The opinion seems to hold that the debt of an heir cannot ever be collected from the inherited property, if the debt was contracted before the heirs had been determined, and this is the holding no matter what the status of the heir might be. There is no escape from the conclusion that the holding of the Circuit Court of Appeals brings about that result, which leads to the insurmountable conclusion that that holding cannot be correct for it is evident that Congress never had any such intention.

Then the conclusion must follow that Congress was merely intending to protect the estate of a decedent in the possession of the administrator, in those cases where he was entitled to possession, for as long as he might need that real estate to

satisfy the purposes of the administration. Or it must be concluded that Congress did not intend by sec. 7 to reimpose on the certificate of competency Indian and non-members the restrictions removed by section 6.

8. Points of the Circuit Court of
Appeals opinion.

(a). The decision on page 3, (R. 87) and after reciting the holding of Judge Kennamer in *United States v. Mullendore*, 30 F. Supp. 13, and the holding of the Supreme Court of Oklahoma in *Pitts v. Drummond*, makes this statement:

"This reasoning leads to the incongruous result that Congress intended to throw greater protection around unrestricted land inherited by an Osage Indian than around restricted land inherited by the same Indian".

We think the statement overlooks two elements of the situation presented:

(1). Where the lands are unrestricted they are liable for the debts of the heir and the administrator would be entitled to possession of them to use or sell them for that purpose, while if the lands are restricted they cannot be used for that purpose or for any other purpose by the administrator, and, therefore, the heir should not be deprived of possession by the administrator.

(2). Whether the heir can alienate would depend on his status. If he was a white man or if he was an Indian with a certificate of competency, or, under the present law, if he was less than one-half Indian blood, he could alienate. If he was a restricted Indian he could not.

If he was a restricted Indian he needed no further protection for he could not alienate anyway.

Congress was evidently trying to provide protection for the administrator or the estate of the decedent and not for the heir; so that the administrator might properly administer that portion of the estate of which he was entitled to have possession and without interference from the heir or creditor of an heir.

(b). On page 5 (R. 89) of the opinion it is stated that the county court was selected by Congress to perform more than ministerial or executive duty; that the inquiry was judicial.

It is agreed that the county court has authority to judicially try the question as to who are the heirs, but it could not surrender possession of the real estate to them because it never had it; it could not oust a trespasser from possession because it had no such power, which Congress well knew. It could not distribute anything over which it never had possession or control. A wrongdoer in possession would have to be ousted by a court of law or a court of equity at a suit by the heir. The administrator could not do it because he did not have possession or the right to possession.

(c). It is stated (page 4 R. 88) that title 58 O. S. A. 251, provides that the executor or administrator must take into his possession the entire estate of the decedent, *'except the homestead and personal property not assets'*.

The restricted land of a deceased Osage is in a very similar position to the homestead of a white person. The

administrator does not take possession of it yet the court finally determines who are the heirs of that homestead.

The opinion then calls attention to section 291 which is the section quoted above and which requires the real estate to be turned over to the heirs within ten months if not needed to pay debts.

(d). If it be agreed that no assets are required in order to give the county court jurisdiction to determine heirs, or even to appoint an administrator as stated on page 5 (R. 89) of the opinion, would that not further confirm the position that the restricted lands were not assets, which were subject to administration?

(e). It appears that the opinion recognizes that the administrator was not entitled to the possession of the real estate for it states, page 4, (R. 88) that the decision does not depend upon whether the lands of a restricted Osage Indian are subject to the jurisdiction of the county court in a sense that it may administer upon such land and subject them to the payment of debts.

The administrator of the estate of a restricted Osage Indian does not receive the rentals from the real estate and the county court does not allow him and he does not receive the statutory commission on the rentals or on the value of the real estate, and he did not receive them in this case.

From the entire opinion it is not clear to us whether or not the view is taken that the administrator or the county

court may have possession of the land for any purpose whatsoever.

On page 5 (R. 89) the case of *in re Gentry's estate*, 158 Okl. 196, 13 P(2d) 156, is cited as holding that the administrator is entitled to possession of all of the real estate and personal property with certain exceptions "until the estate is settled and delivered to the heirs." In the opinion in that case that language was used, but in the syllabus by the court, which under the holdings of the Oklahoma Supreme Court is the law of the case, the language is: "Until the estate is settled or delivered over to the heirs." The case cited in the opinion also uses the word "or". Under section 291, Title 58 O. S. A. herein quoted, the real estate must be delivered to the heirs when not needed for the payment of the debts, before the estate is settled, and the administrator never has possession of the homestead.

On page 5 (R. 89) of the opinion it is stated that the Oklahoma Supreme Court has held "that property of one who dies intestate passes to the heirs subject to the control of the county court and to the possession of the administrator". We think the statement is correct as a general rule, qualified by the exception that the administrator is not entitled to possession of the homestead, and further qualified by the exception that he is entitled to possession of the other real estate only until it has been determined that it will not be needed for the payment of debts.

It is correct that the county court has the privilege and duty of determining to whom the real estate has descended.

The case of Whitehouse Lumber Co. v. Howard, 142 Okl. 163, 286 P. 327, cited in the opinion, states that "prior to distribution (determination of the heirs) the actual interest of the heir of the intestate is undetermined and subject to determination thereof by the county court".

The decision holds the land descended under the law of succession of the state but that the county court determined just what the interest was. The point in the case was whether the judgment of a creditor of the heir attached as a lien to the heir's interest in the real estate. The court held that it did so attach to whatever real estate was left after the administrator was through with it.

We see nothing in the case that in any way controverts the position that title and ownership passes upon the death of the intestate, and in this case also the right to immediate possession, all of which together certainly constitutes a turning over, and a later adjudication confirming all of those rights cannot affect the fact that the turning over had occurred long prior thereto.

If the question is one of determination of the law of the state of Oklahoma, then the federal courts are bound by the interpretation given to that law by the highest court of the state of Oklahoma. Jackson v. Harris (CCA 10) 43 F. (2d) 513; Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188; United States of America v. State of Texas, 314 U. S. 480, 86 L. ed. 356, and the decision in Pitts v. Drummond, 198 Okl. 574, 118 P(2d) 244, must control, for in that case

the exact question involved here was before the court and the Supreme Court of Oklahoma held as follows, on page 246 of 118 P(2d):

"It follows that there was no court or officer with power or authority to "turn over" the lands or to deliver them to the heirs. Immediately on the death of the owner they descended to the heirs free from all restrictions together with the absolute right of immediate possession".

The holding of the Circuit Court of Appeals, quoted below, is in direct conflict with the foregoing Oklahoma Supreme Court interpretation of the Oklahoma law.

(f). Page 6 (R. 90) of the opinion contains these statements:

"It is true that the title to real estate vests in the heirs upon the death of the testator, but it is not absolute until heirship is determined and an order of distribution made. * * *

"Where the property is restricted, he is not entitled to receive it until his title has been legally adjudicated by an order of the court determining heirship and directing its distribution to him".

Is not an adjudication of heirship an adjudication that he does have and has had "an absolute" right to it? Is his right any greater after the adjudication than it was before? Did he not have all of those rights before and was not the decree only a determination that they existed? If his right had not been absolute, would he have been adjudged an heir?

The decree of heirship does not give or create ownership. It is the relationship to the decedent and the law of succession

which creates the title, and the ownership. The decree of heirship simply enables the heirs to easily establish their title and ownership. It is a muniment of title, but it is not the title itself.

It being acknowledged, or at least established, that the administrator is not entitled to receive the land, then who is entitled to receive it or have possession of it upon the death of the intestate? It being acknowledged that the heir has title and that the administrator has no right to possession and no title who, except the heir, can receive it and have possession of it?

If the decision actually means that the heir cannot receive or have possession of the real estate until the heirs have been determined, then it must mean that the administrator is entitled to receive, use and have possession of such real estate and a long line of uniform decisions have been overruled, and the Interior Department must reverse its policy of many years standing and permit payment to the administrators of commissions on the rentals and on the value of the lands of restricted Indians.

If the opinion does not mean that, then the conclusion that the heir had the title and right to possession is irresistible.

9. The United States consented to be bound by the State Court action.

It should be remembered that Barney was employed to represent George Pitts by the approval of the Secretary of

the Interior; that the Secretary of the Interior aided in the state court litigation; approved supersedeas bond: advanced the necessary costs and expenses from the Pitts' funds; approved of the appeal to the Supreme Court of the state of Oklahoma, and the making of the application to the Supreme Court of the United States for writ of certiorari; and that the United States is here undertaking to re-litigate the exact question which was litigated through the state courts and by application for writ of certiorari to the Supreme Court of the United States. (Trial Court Findings IX and X. R. 56).

The Circuit Court of Appeals opinion appears to imply that this question would depend upon whether or not counsel for Pitts was authorized to appear for or represent the United States, but appearance for and representation of the United States is not required in order to estop the United States from maintaining the second action. It is sufficient if the United States by its assistance in the state court litigation consented to be bound by the result of that litigation.

The question then is:— Can the Government, just because it is the Government, compel a private citizen to litigate his cause of action a second time and after his adversary has had and has taken advantage of every possible opportunity to defend against him and carried the litigation to the highest court in the land and been aided, and assisted, by the Government in doing so?

Please understand that it is not claimed that the state

court did not have full and complete jurisdiction in the former action, both, of the subject-matter and of the parties; nor is it claimed that there was any lack of authority or capacity on the part of George Pitts to defend against that action, nor that it was not well and ably defended; nor is it contended that there is any different question involved here than was involved in the former action, and it is alleged and admitted by the government that this present action is for and on behalf of George Pitts.

The contention is simply that the same question may be again litigated after a final decision in the former action by the court of last resort, the first litigation being by George Pitts in his own behalf, and the second litigation being by the government in behalf of George Pitts.

To understand the authorities relied upon by the United States there should first be read the case of United States v. Candelaria, 16 F.(2d) 559, at pages 562, 563; and then the same case, opinion by the Supreme Court of the United States, 270 U. S. 432, 70 L. Ed. 1032¹⁰³³, and also the case of Lane v. Santa Rosa, 249 U. S. 110, 63 L. Ed. 604, 39 S. Ct. Rep. 185.

Please note that the state court has jurisdiction and that the United States is not barred from enforcing restrictions against alienation "without its consent".

Then it is determined by the Supreme Court and by the Circuit Court that the United States by authorizing Wilson as special attorney for the Pueblo to represent the Pueblo gave

its consent to be bound by the resulting judgment.

In the case at bar the government had authorized Barney to represent George Pitts. He represented George Pitts exactly as Wilson represented the Pueblo, in the Candelaria case, and he represented George Pitts under specific, direct, and contractual authority from the government.

The fact that the United States furnished the money for the Pueblo in the Candelaria case to pay an attorney is only an incident in connection with the matter and not the controlling fact.

The point is, did the United States by its assistance in carrying on the litigation consent to be bound by the resulting judgment? See *Souffront v. LaCompagnie Des Secreries*, 217 U. S. 475, 30 S. Ct. 608, 54 L. Ed. 846; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129.

The United States relies strongly on the case of *Logan v. United States*, 58 F.(2d) 247. It can be observed that, while the Logan opinion purports to accept the Candelaria case as authority, the distinction made is not justified by the Candelaria opinion.

The Logan decision is then placed upon safer ground that there was no congressional authority for the Secretary of the Interior or the Superintendent of the Osage Agency to appear in state court litigation.

It has been adjudicated that when the United States litigates for an Indian, the Indian cannot relitigate. Heckman

v. United States, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820; Vinson et al., v. Graham, et al, 44 F(2d) 772; Fulson v. Quaker Oil & Gas Co., 35 F(2d) 84; Marrs, et al, v. McDougal, et al, 40 F(2d) 247.

The United States cannot maintain the second action for a beneficiary under the Federal Employers' Liability Act. Chicago R. I. & P. Ry. v. Schendel, 270 U. S. 611, 70 L. Ed. 757.

Where the state court has jurisdiction to entertain a suit in behalf of an Indian the Indian has a right to apply to the Supreme Court of the United States, if not satisfied with the state court decision, and the result should be final and conclusive. 27 Am. Jur. 572, United States, ex rel Kennedy v. Tyler, 269 U. S. 13, 70 L. Ed. 138.

It cannot be successfully contended that the interest of the United States is superior or more inclusive than the interest of George Pitts. His interest was to protect his land against improper alienation. The interest of the government is to protect George Pitts' land against improper alienation.

As was said by the Supreme Court of the United States in the case of Heckman v. United States, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820, the government might bring its own action in behalf of the Indian or it might permit him to bring his own action, "and if so brought, the United States might aid him in its conduct." Then the Court said, "in the opportunity thus afforded there is no room for the vexation of repeated litigation of the same controversy".

As was suggested by the Supreme Court of the United States in *Kennedy v. Tyler*, 269 U. S. 13, 70 L. Ed. 138, if the decision of the state court was not satisfactory the Supreme Court of the United States was open to redress any wrong that might have been done or to correct any error that might have been committed. George Pitts sought such redress or correction and the Supreme Court of the United States found no merit in his contention.

If George Pitts had a right to alienate this land at the time he gave the mortgage, the United States cannot maintain this action. *United States v. Waller*, 243 U. S. 452, 61 L. Ed. 43.

SUMMARY.

May it be suggested that Congress intended a construction which would not be imposing restrictions upon white heirs or heirs with certificates of competency but one which would protect the estate of a decedent for proper administration. These points seem clear:

1. Section 6 removed all restrictions on lands inherited by an Indian with a certificate of competency.
2. Section 7 construed along with section 6 excludes the non-member of the tribe and the certificate of competency Indian from its operation.
3. The questioned sentence of section 7 refers only to involuntary subjecting of property to the debt of an heir and not to voluntary alienation.

4. The sentence was meant only to prevent interference with the administrator by the creditor of an heir when, and only for so long as, he was entitled to possession and was not intended to make a valid and just debt forever uncollectable from inherited property.

5. The title, ownership, and right to possession passed at once to the heir upon the death of the intestate, which constituted turning over.

6. The United States by its assistance in the State Court litigation is estopped from maintaining this action.

Respectfully submitted,

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